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Jessica Meyer

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Obesity Harassment in School: Simply “Teasing” Our Way to Unfettered Obesity Discrimination and Stripping Away the Right to Education

Jessica Meyer*

Introduction

Aleta Walker hid in the library. She went out to the baseball field. She stayed in the bathroom. She went anywhere except to the cafeteria at lunch time. Bullying and teasing followed Aleta most places at school, but the cafeteria was where the other kids—the thinner kids—got to her the most. That was where Aleta’s peers threw spaghetti at her and made pig noises as she ate—for no reason other than that Aleta was overweight.¹

Sadly, Aleta is not the only overweight child to face this type of harassment at school.² For the rapidly growing population of overweight and obese students,³ “the school experience is one of ongoing prejudice, unnoticed discrimination, and almost constant

* J.D. Expected 2006, University of Minnesota Law School. I would like to thank my parents, Lee and Lori Meyer, for beginning me early on a path toward success, and my sisters, Jennifer Meyer and Jackie Hamre, for our unwavering friendship. And thank you also to my grandpa, whose memory inspires me every day to try to live up to all he saw in me.

1. See Gina Kolata, *The Burdens of Being Overweight: Mistreatment and Misconceptions*, N.Y. TIMES, Nov. 11, 1992, at A1.

2. See NAT’L EDUC. ASS’N, *Report on Size Discrimination*, Lectric Law Library (Oct. 7, 1994), at <http://www.lectlaw.com/files/con28.htm> (last visited Mar. 3, 2005) (citing Sacramento-based survey that found half of the 445 male and female students surveyed reported being victims of anti-fat jokes and negative, weight-related nicknames).

3. See INST. OF MED., *Childhood Obesity in the United States: Facts and Figures 1* (Sept. 2004), at <http://www.iom.edu> (last visited Mar. 3, 2005) (noting that during the past thirty years, the childhood obesity rate more than doubled in children aged two to five and twelve to nineteen and more than tripled for children aged six to eleven); see also William C. Taussig, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department [sic] of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act*, 35 B.C. L. REV. 927, 929 (1994) (showing about 32 million Americans (28 percent) are overweight and 1.5 million (1 percent) are morbidly obese).

harassment.”⁴ As early as the second grade, children shown pictures of an overweight child characterize that child as, among other things, dirty, lazy, and stupid.⁵ These attitudes can produce a hostile environment that is unwelcoming for overweight children.

This Article discusses how obesity affects a growing number of children and how bullying and harassment at school are directly linked to reduced self-esteem in overweight children.⁶ Based on these facts, this Article argues that overweight children need and deserve better protection against harassers because a hostile environment at school causes a discriminatory impact on their educational opportunities.⁷ Next, this Article considers existing statutes that have been used to bring claims of obesity discrimination and harassment in the workplace and disability discrimination at school.⁸ The discussion explores the benefits of these statutes,⁹ their shortcomings,¹⁰ and how they can be utilized to create legislation to protect obese children’s educations.¹¹ Finally, the Article argues that overweight children attending public schools should receive protection from harassment and discrimination to ensure their educational opportunities do not suffer, and offers suggestions on how best to structure new policies to achieve this purpose.

I. Where It All Begins: A Brief Overview of the Obesity Problem

When defining obesity, there is anything but a “one-size-fits-all” approach. The medical community has divided the 70 million overweight Americans¹² into three categories—overweight, obese and morbidly obese—each carrying different legal and societal

4. NAT’L EDUC. ASS’N, *supra* note 2. See generally Ian Janssen et al., *Associations Between Overweight and Obesity with Bullying Behaviors in School-Aged Children*, 113 PEDIATRICS 1187 (2004).

5. See NAT’L EDUC. ASS’N, *supra* note 2; see also Taussig, *supra* note 3, at 933 (stating that “[s]tudies of grade school children reveal that discrimination against the obese is deeply rooted in the American psyche”).

6. See *infra* notes 23-32 and accompanying text.

7. See *infra* notes 24-32 and accompanying text.

8. See *infra* notes 38-67 and accompanying text.

9. See *infra* Part I.B.

10. See *infra* Part II.B.3.

11. See *infra* Part II.B.

12. See Elizabeth E. Theran, “Free to Be Arbitrary and . . . Capricious”: Weight-Based Discrimination and the Logic of American Anti-Discrimination Law, 11 CORNELL J.L. & PUB. POL’Y 113, 136 (2001).

ramifications.¹³ There are a variety of environmental, physical, and psychological factors that contribute to obesity.¹⁴ Recent studies have also shown that genetics play a role in obesity and that it may not be a voluntary condition.¹⁵ Despite this evidence, many non-overweight Americans see overweight people as responsible for their condition and tend to make it difficult for overweight people to be successful at work and school.¹⁶ Obese persons, specifically children, are susceptible to a wide variety of health risks, which draw much-needed publicity and public awareness.¹⁷ Those children also face potentially life-altering emotional and psychological challenges that can prove equally detrimental to their overall well-being.¹⁸

13. See Donald L. Bierman, Jr., *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?*, 30 SANTA CLARA L. REV. 951, 956-57 (1990) (noting that overweight means any weight above the ideal weight defined in tables and published by insurance companies, obesity means a person whose weight is 20 percent above the ideal weight, and morbid obesity means a person whose weight is either 100 pounds over or twice the ideal weight); see also INST. OF MED., *supra* note 3, at 1 (defining obesity in reference to children ages two to eighteen as those with "body mass indexes (BMI) equal to or greater than the 95th percentile of the age- and gender-specific BMI charts developed by the Centers for Disease Control and Prevention"); *infra* note 80 and accompanying text (discussing how courts have handled different stages of obesity).

14. See INST. OF MED., *supra* note 3, at 1 (attributing a rise in childhood obesity to a number of social, environmental, and policy contexts).

15. See Bierman, *supra* note 13, at 957 (stating that there are "several medical or psychological reasons that may cause an individual to be obese" and that "[obesity] may relate to genetic composition, brain disorders, medical or psychological disorders"); see also Scott Petersen, *Discrimination Against Overweight People: Can Society Still Get Away with It?*, 30 GONZ. L. REV. 105, 106 (1994-95) (observing that research shows obesity may not be a voluntary condition); Tharan, *supra* note 12, at 149 (stating that "individuals of the same weight can weigh what they do for totally different reasons" and that there are genetic disorders that affect weight such as Prader-Willi, Bardet-Biedl, Ahlstrom, Cohen, and Carpenter syndromes).

16. See NAT'L EDUC. ASS'N, *supra* note 2.

17. See INST. OF MED., *supra* note 3, at 2 (listing common health problems such as glucose intolerance and insulin resistance, type 2 diabetes, hypertension, dyslipidemia, sleep apnea, menstrual abnormalities, impaired balance, and orthopedic problems).

18. See Kelly D. Brownwell & Thomas A. Wadden, *Confronting Obesity in Children: Behavioral and Psychological Factors*, 13 PEDIATRIC ANNALS 473, 473 (June 1984) ("The professional community is concerned with the medical concomitants of obesity, but the psychological and social perils are at least as important to those afflicted by the problem."); Janssen et al., *supra* note 4, at 1193 (stating that an overweight childhood is associated with metabolic health risk and problems with "social interactions and relationships"); see also NAT'L CTR. FOR EDUC. IN MATERNAL AND CHILD HEALTH, *Article Presents Findings on the Health-Related Quality of Life of Severely Obese Children and Adolescents*, MCH Alert (Apr. 2003), at <http://www.mchlibrary.info/alert/alert042503.html> (last visited Feb. 9, 2005) (summarizing research that found obese children and adolescents are 5.5 times more likely to have an impaired quality of life, 5.9 times more likely to report

A. Obesity's Lasting Effect on Children

Although obesity has become somewhat of an epidemic for people of all ages, it has been described as the most prevalent health issue facing children today.¹⁹ Studies indicate that 30 percent of children in the United States are overweight or obese.²⁰ Still, there has not been an increase in awareness and acceptance of overweight children. Most children learn at an early age that it is unacceptable to treat people differently because of their race or gender; however, they generally are not taught that it is equally unacceptable to berate, chastise, ridicule, or physically harm overweight children.²¹ These behaviors have yielded a strong correlation between declining self esteem and being overweight in school-aged children, which some researchers suggest is caused by a greater amount of bullying directed at overweight children as

impaired psychological function, and 4 times more likely to report impaired school function than their non-obese counterparts); Carol Torgan, *Childhood Obesity on the Rise*, National Institutes of Health (June 2002), at <http://www.nih.gov/news/WordonHealth/jun2002/childhoodobesity.htm> (last visited Feb. 8, 2005) (stating "perhaps more devastating to an overweight child than the health problems is the social discrimination").

19. See Zuguo Mei et al., *Increasing Prevalence of Overweight Among U.S. Low-Income Preschool Children: The Centers for Disease Control and Prevention Pediatric Nutrition Surveillance, 1983 to 1995*, 101 PEDIATRICS 12, 12 (1998), at <http://pediatrics.aappublications.org/cgi/content/full/101/1/e12> (last visited Feb. 8, 2005) (observing that childhood obesity is of growing concern in developed countries); Richard S. Strauss & Judith Knight, *Influence of the Home Environment on the Development of Obesity in Children*, 103 PEDIATRICS 85, 85 (June 1999), at <http://www.pediatrics.org/cgi/content/full/103/6/e85> (last visited Mar. 5, 2005).

20. See Associated Press, *State Study Suggests National Child Obesity Problem* (June 2004), at <http://www.bandlandia.com/pages/news%20Articles/Bandlandia%20ContextNews%206-10-04.htm> (last visited Feb. 20, 2005); see also Janssen et al., *supra* note 4, at 1187 (stating that "children are the fastest-growing segment of the overweight and obese population"); *Childhood Obesity*, American Obesity Association, at <http://www.obesity.org/subs/childhood/prevention.shtml> (last visited Feb. 8, 2005) (reporting that 43 percent of students say they are trying to lose weight and 59 percent of female students claim they are trying to lose weight).

21. See Tonja R. Nansel et al., *Bullying Behaviors Among U.S. Youth: Prevalence and Association with Psychosocial Adjustment*, 285 J. AMER. MED. ASS'N, 2094, 2098 (2001) (arguing it may be more socially acceptable for children to tease peers about their appearance than to make negative comments about race); see also Petersen, *supra* note 15, at 105 (noting "[o]verweight people [remain] the last group against whom society accepts blatant discrimination"); Theran, *supra* note 12, at 153 (stating that although blatantly stigmatizing other groups is viewed as morally objectionable, "belittling" jokes directed toward the overweight can be seen any night of the week on prime-time television") (quoting Diane M. Quinn & Jennifer Crocker, *Vulnerability to the Affective Consequences of the Stigma of Overweight*, in PREJUDICE: THE TARGET'S PERSPECTIVE 125, 125 (Janet K. Swim & Charles Stangor eds., 1998)); NAT'L EDUC. ASS'N, *supra* note 2 (stating elementary school children "learn that it is acceptable to dislike and deride fatness").

compared to their non-overweight peers.²²

Research indicates that bullying²³ and its psychological consequences "may hinder the social development of overweight and obese youth, because adolescents are extremely reliant on peers for social support, identity and self-esteem."²⁴ Because they are bullied more often, obese children are especially susceptible to reduced self-esteem, which can lead to a decline in academic performance.²⁵ The isolation caused by bullying and harassment is compounded by the fact that many overweight students also are unable to participate on sports teams and generally have fewer opportunities at school.²⁶ This produces an environment for overweight children that makes learning very difficult and puts

22. Janssen et al., *supra* note 4, at 1187 (noting that the "prevalence of social problems among obese adolescents is quite high, and these social problems are predictive of both short-term and long-term psychological outcomes").

23. Bullying has been defined as:

[A] specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one. This asymmetry of power may be physical or psychological, and the aggressive behavior may be verbal . . . physical . . . or psychological.

Nansel et al., *supra* note 21, at 2094; *see also* NAT'L CTR. FOR EDUC. IN MATERNAL AND CHILD HEALTH, *Bullying is Associated with Other Violent Behavior, Study Suggests*, MCH Alert (Apr. 25, 2003), at <http://www.mchlibrary.info/alert/alert042503.html> (last visited Feb. 9, 2005) (defining bullying as an "intention to harm and a power differential between the bully and the target").

24. *Obesity and Bullying Linked*, CBSNews.com (May 3, 2004), at <http://www.cbsnews.com/stories/2004/05/03/health/main615159.shtml> (last visited Feb. 9, 2005); *see also* T. DeAngelis, *Size-based Discrimination May Be the Hardest on Children*, MONITOR ON PSYCHOLOGY, Jan. 2004, at 62 (discussing link between ostracism and obesity among children); INST. OF MED., *supra* note 3, at 2 (noting physical, emotional, and social consequences of obesity such as low self-esteem, depression, discrimination, social marginalization, and negative stereotyping). Richard Strauss notes "[b]ecause negative weight perceptions are particularly common among young adolescent white females, it is not surprising that young obese adolescent white females show the lowest levels of global self-esteem." Strauss, *supra* note 18, at 4. Strauss finds that "[o]verall, 69% of obese white females showed decreased levels of global self-esteem over the 4-year [observation] period compared with 43% of nonobese white females." *Id.* at 2. *See also* Theran, *supra* note 12, at 153-54 (stating that at age five, children would rather lose an arm than be fat and by age six to nine children have already begun to dislike fat bodies, including, for girls, their own).

25. *See* Janssen et al., *supra* note 4, at 1192 (noting that being overweight in adolescence affects high school performance and college acceptance); NAT'L EDUC. ASS'N, *supra* note 2 (citing a 1967 study that shows negative effects of obesity on academic performance and a 1966 survey that shows obese students, especially girls, were less likely to be accepted to more competitive colleges).

26. *See* NAT'L EDUC. ASS'N, *supra* note 2 (stating overweight students develop low self-esteem and have limited opportunities at school, including sports and other extracurricular activities).

their right to education²⁷ at risk.²⁸ All together the inability of overweight children to develop social skills and to reap the full benefits of an education results in the "psychic and emotional costs of not developing the skills and abilities to live a fulfilling life."²⁹

While peers are the main perpetrators of discriminatory behavior, stigmatizing messages are often reinforced by teachers and coaches through their use of programs, such as physical education containing "requirements' that may be unrealistic for heavier children . . . or may just be deeply humiliating. . . ."³⁰ Even where there is not direct discrimination by school officials against overweight children, there remains an inability on the part of the schools to handle obese children in an appropriate fashion.³¹ The refusal, denial, or inability of teachers and administrators to contend with and prevent harassment, discrimination, and bullying creates a toxic environment for targeted students.³²

In the context of sexual harassment, courts have rejected the notion that teachers and administrators are not responsible for the

27. Although the "Federal Constitution neither explicitly nor implicitly recognizes a fundamental right to education . . . almost every state constitution commands the state legislature to provide a free primary and secondary public education to the state's students." Patrick Richard McKinney II, *On the School Board's Hit List: Community Involvement in Protecting the First and Fourth Amendment Rights of Public School Students*, 52 HASTINGS L.J. 1323, 1328-29 (2001) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973) and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting)); see also N.M. STAT. ANN. § 22-12-4(A) (2004) ("[E]xcept for school age persons who are detained . . . any school age person shall have a right to attend public school within the school district in which he resides or is present."); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979) (holding that West Virginia considers the right to education a fundamental right under its state constitution); *Mason v. Bd. of Educ.*, 149 N.W.2d 239, 242 (Mich. Ct. App. 1967) (holding that public policy "prohibit[s] unjust discrimination in determining the right of a child to attend any school").

28. See *Davis*, 526 U.S. at 678 (Kennedy, J., dissenting) (stating that "[m]ost children respond to teasing in ways that detract from their ability to learn").

29. Ruth Colker, *BI: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 57 (1995).

30. Theran, *supra* note 12, at 154.

31. See NAT'L EDUC. ASS'N, *supra* note 2 (noting that even if the teachers do not intend to single out overweight children, or to ignore them, the fact remains that they often respond inappropriately to obese children); see also *Landers v. Sch. Dist. No. 203*, 66 Ill. App. 3d 78, 78 (Ill. App. Ct. 1978) (holding district liable where plaintiff expressed concern to her physical education teacher about performing a backward somersault both because she had no training and because she was overweight and the teacher made her perform the stunt and the plaintiff injured her neck).

32. See Lisa Walls, *Bullying and Sexual Harassment in Schools*, Committee for Children, at <http://www.cfchildren.org/articlef/walls1f/> (last visited Mar. 30, 2005).

interaction between their students, holding that once teachers become aware of problems, they are required to take reasonable action to stop it.³³ Teachers and administrators can be held responsible because when the misconduct happens at school during school hours, it occurs under the supervision of employees of a federally-funded school.³⁴ Because children are less able than adults to protect themselves, supervising school administrators "must be particularly steadfast in addressing and preventing any form of verbal or physical harassment/abuse directed at their students."³⁵ The Supreme Court in *Davis v. Monroe County Board of Education*³⁶ held that "funding recipients are properly held liable in damages only where they are deliberately indifferent to [harassment], of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."³⁷

B. Legislation Aimed at Suppressing the Obesity Discrimination Problem

There is no federal law that offers overweight persons protection against discrimination.³⁸ In a search for remedies, overweight persons have used legislation aimed at protecting the rights of disabled persons to bring claims of obesity discrimination, primarily in the workplace. The Americans with Disabilities Act (ADA)³⁹ and the Rehabilitation Act⁴⁰ require the discrimination

33. See *Davis*, 526 U.S. at 646 (finding liability where school failed to respond properly to "student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees." (quoting *Doe v. Univ. of Ill.*, 138 F.3d 653, 661 (7th Cir. 1998)). The Court also noted that the state's power over school children is different from a supervisory role the state could impose over an adult because the nature of the relationship at school is "custodial and tutelary." *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

34. *Id.* at 646.

35. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 952 (7th Cir. 2002) (citing *Davis*, 526 U.S. at 648).

36. 526 U.S. 629 (1999).

37. *Id.* at 650.

38. See Carol R. Buxton, *Obesity and the Americans with Disabilities Act*, 4 BARRY L. REV. 109, 111 (2003).

39. 42 U.S.C. §§ 12101-12213 (2000) [hereinafter ADA]; see *id.* § 12132 (providing that "no qualified individual with a disability shall by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

40. 29 U.S.C. §§ 720-7961 (2000); see *id.* § 794(a) (providing that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason

claim to be based on a disability, which means that obesity must be classified as a disability for the claim to be appropriate under those statutes. A parallel statute related to education is the Individuals with Disabilities Education Act (IDEA),⁴¹ which also requires the finding of a disability for the statute to take effect. Thus, under current legislation, the central issue in determining whether protection exists for overweight children is whether obesity is a disability. Without such protection, overweight children who suffer from repeated harassment face social ramifications that stretch beyond the classroom and remain prevalent throughout their lifetime.⁴²

1. The ADA and the Rehabilitation Act: A Framework for Obesity Legislation

Although the ADA and the Rehabilitation Act speak mainly to employment discrimination based on disabilities, they provide the framework and case law related to obesity litigation. Under the ADA and the Rehabilitation Act, a plaintiff can establish a discrimination claim by proving either that the plaintiff has a disability⁴³ or that her employer believed she had an "impairment" that, if it truly existed, would be covered under the statutes and that the employer discriminated against the plaintiff on that basis."⁴⁴ The medical diagnosis of an impairment is not as important in defining a disability under these acts as the effects of

of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

41. 20 U.S.C. §§ 1400-1487 (2004) [hereinafter IDEA]; *see id.* § 1400 (providing all disabled children access to adequate free public education).

42. *See* INST. OF MED., *supra* note 5, at 2 (indicating psychosocial burdens of obesity carry on to adulthood); *see also* Taussig, *supra* note 3, at 934 ("The obese are socially stigmatized from early childhood and throughout their adult lives.").

43. *See* 42 U.S.C. § 12102(2) (2000) (stating that under the ADA, "disability" means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment").

44. *Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir. 1997). To prove a *prima facie* case on these grounds, the plaintiff must show that she:

- (i) has a disability within the meaning of the Act; (ii) is qualified to perform the essential functions of the job, with or without reasonable accommodations; (iii) was subject to an adverse employment action by a company subject to the Act; (iv) was replaced by a non-disabled person or was treated less favorably than non-disabled employees; and (v) suffered damages as a result.

Ridge v. Cape Elizabeth Sch. Dept., 77 F. Supp. 2d 149, 155-56 (D. Me. 1999); *see id.* (stating that if a plaintiff cannot prove the case directly, she can shift the burden to the defendant by showing a *prima facie* case).

the impairment on a person's life.⁴⁵ The Rehabilitation Act states that a person has a disability when he or she "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,⁴⁶ (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."⁴⁷ This definition is nearly identical to, and is generally interchangeable with, the ADA definition.⁴⁸ The Rehabilitation Act has been read broadly to include conditions such as substance abuse and alcoholism as disabilities.⁴⁹ The Rehabilitation Act also "contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment,"⁵⁰ which is valuable in an obesity case where the cause and mutability of the condition may be at issue.⁵¹

2. The IDEA: An Effort to Help Disabled Children

The IDEA strives "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."⁵² The statute was enacted in 2004 for the purpose of improving "educational results for children with disabilities [as] an essential element of our national policy of

45. See *Nedder v. Rivier Coll.*, 908 F. Supp. 66, 75 (D.N.H. 1995); see also 29 C.F.R. pt. 1630 App., § 1620.2(j) (2004) ("Many impairments do not impact an individual's life to the degree that they constitute disability impairments.").

46. 45 C.F.R. § 84.3(j)(2)(ii) (1992); see Petersen, *supra* note 15, at 112 n.67 (defining major life activities as including "walking, breathing, working, and other manual tasks" (citation omitted)); see also 29 C.F.R. Pt. 1630, App. § 1630.2(i) (2004) (stating that major life activities are those that the "average person in the general population can perform with little or no difficulty").

47. 45 C.F.R. § 84.3(j)(2)(iv) (1992); see also *Ridge*, 77 F. Supp. 2d at 162 (stating that a plaintiff will be regarded as having a disability where the individual is treated by the employer as if she were disabled and considering the effect the plaintiff's obesity had on the employer).

48. See 42 U.S.C. § 12102(2) (2000).

49. See *Teahan v. Metro-N. Commuter R.R. Co.*, 951 F.2d 511, 517 (2d Cir. 1991) (holding substance abuse is a handicap under the Rehabilitation Act); *Gallagher v. Catto*, 778 F. Supp. 570, 577 (D.C. 1991) (holding alcoholism is a handicap under the Rehabilitation Act).

50. *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 24 (1st Cir. 1993).

51. See *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695, 698 (N.Y. 1985) (stating that the Rehabilitation Act "protects all persons with disabilities and not just those with hopeless conditions"); Taussig, *supra* note 3, at 958 (noting that "[n]owhere within the text of the Rehabilitation Act or the ADA is there any mention of voluntariness or mutability as an automatic disqualifier for recognizing a particular condition as a physical or mental impairment").

52. 20 U.S.C. § 1400(d)(1)(A) (2004).

ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”⁵³ In order for a state to receive federal funding under the IDEA, the state “must comply with federal requirements designed to provide a ‘free appropriate public education’⁵⁴ . . . for all disabled children.”⁵⁵

Again, in order to make a claim, this statute requires finding that the obese child is disabled, but the IDEA defines disability more broadly to include “not only those [children] traditionally recognized as handicapped . . . but also those [children] with ‘serious emotional disturbance . . . who by reason thereof, need special education and related services.’”⁵⁶ An emotional disturbance includes “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; . . . a general pervasive mood of unhappiness or depression; and/or . . . a tendency to develop physical symptoms or fears associated with personal or school problems.”⁵⁷

To file a complaint under the IDEA, the child, or the family of the child, must first exhaust all administrative remedies by presenting its complaints to administrative bodies under § 1415(l) of the Act.⁵⁸ If any party is unhappy with the outcome of the

53. *Id.* § 1400(c)(1).

54. *Id.* § 1401(8).

The term ‘free appropriate public education’ means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. See also *Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004). In defining an appropriate free education in accordance with 20 U.S.C. § 1412(a)(1), the administrative body in *Shore* found that P.S. could not be afforded appropriate public education because of the “legitimate and real fear that the same harassers who had followed P.S. through elementary and middle school would continue [to bully him]”. *Id.* at 197.

55. *Shore Reg'l High Sch. Bd. of Educ.*, 381 F.3d at 198 (quoting 20 U.S.C. § 1412(a)(1) (2004); see also *Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 459 (6th Cir. 1993) (noting that the “educational benefits a state does provide must be more than *de minimis* in order to be appropriate”). See generally IDEA, 20 U.S.C. § 1400-1487 (2004).

56. *Lindsley ex rel. Kolodziejczack v. Girard Sch. Dist.*, 213 F. Supp. 2d 523, 531 (W.D. Pa. 2002) (quoting 20 U.S.C. § 1401(3)(A) (1997)).

57. 34 C.F.R. § 300.7(c)(4)(I) (2004).

58. See 20 U.S.C. § 1415(l) (2004) (providing that “before the filing of a civil action under such laws [the ADA, Rehabilitation Act, or the IDEA] . . . the procedures under subsections (f) and (g) of this section shall be exhausted”); *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 980 (8th Cir. 2003) (holding that unless exhaustion would be futile or inadequate, the aggrieved parties must meet

administrative process, a hearing can be held to bring the case to state or federal court.⁵⁹ At that civil action, the court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."⁶⁰ In reviewing a suit brought under the IDEA, "the court must determine whether the state has complied with the procedures set forth in the IDEA"⁶¹ and must evaluate "whether the IEP [individualized education program] developed through those procedures is reasonably calculated to enable the child to receive educational benefits."⁶² A court likely will find that "a school system's failure to comport with the procedural requirements of the IDEA will constitute a denial of a FAPE [free appropriate public education] only if such violations caused substantive harm to the child or his parents,"⁶³ thus placing the burden on the plaintiffs to show actual harm.⁶⁴

The Supreme Court has allowed payment of "compensatory education"⁶⁵ under the IDEA to students whose education could not be protected by an individualized education program in their public school.⁶⁶ The rationale supporting this remedy is that "imposing liability for compensatory educational services on the defendants 'merely requires [them] to belatedly pay expenses that [they] should have paid all along.'"⁶⁷

the exhaustion requirement).

59. See *M.P. ex rel. K.*, 326 F.3d at 980.

60. 20 U.S.C. § 1415(i); see also *Lindsley*, 213 F. Supp. 2d at 535 n.4 (stating "the court is to give 'due weight' to the administrative proceedings, and although it may accept or reject the administrative body's findings, it 'must be careful not to substitute its judgment about proper education methods for that of the state educational authorities'" (quoting *Jonathan G.V. Lower Merion Sch. Dist.*, 955 F. Supp. 413, 414-15 (E.D. Pa. 1997) (citation omitted)).

61. *Barnett v. Memphis City Sch.*, 113 Fed. Appx. 124, 128 (6th Cir. 2004) (citations omitted).

62. *Id.*

63. *Id.*

64. *Id.* (citing *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001)).

65. "Compensatory education is a judicially-constructed form of relief designed to remedy past educational failings for students who are no longer enrolled in public schools due to their age or graduation." *Id.* at 124 (citing *Pihl v. Mass. Dept. of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993)).

66. *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, 370-71 (1985).

67. *Barnett*, 113 Fed. Appx. at 126 (quoting *Sch. Comm. of Burlington*, 471 U.S. at 370-77 (1985)). See generally Mark C. Weber, *Disability Harassment in Public Schools*, 43 WM. & MARY L. REV. 1079, 1092 (2002) (explaining the application of the IDEA to disability discrimination in schools).

C. The Common Refusal to Find Obesity Is a Disability

Although plaintiffs have used the ADA and the Rehabilitation Act to bring obesity discrimination claims, the Equal Employment Opportunity Commission (EEOC) has found obesity is a disability only in rare circumstances, noting its resemblance to physical, psychosocial, or cultural characteristics that are not impairments.⁶⁸ Many courts find that in the context of the ADA and the Rehabilitation Act, obesity is not a physical impairment except in special cases.⁶⁹ Those courts have held that obesity is not a disability without something more, such as a physiological impairment that affects weight control.⁷⁰

A few courts have noted that "obesity need not be accompanied by a related medical condition to constitute a handicap."⁷¹ The landmark case in this regard is *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*⁷² where the First Circuit held it was inappropriate under the Rehabilitation Act for an employer to discriminate based on an employee's morbid obesity.⁷³ The court did not find morbid obesity itself was a disability, but rather held that because the employer

68. See 29 C.F.R. Part 1630 App. § 1613.2(h) (2004) ("['I]mpairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, *weight*, or muscle tone that are within 'normal' range and are not the result of physiological disorder." (emphasis added)).

69. See, e.g., *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997); *Furst v. N.Y. Unified Court Sys.*, No. 97-CV-1502, 1999 U.S. Dist. LEXIS 22588 at 13 (E.D.N.Y. 1999).

70. See *Bierman*, *supra* note 13, at 961; see also *Torcasio v. Murray*, 57 F.3d 1340, 1354 (4th Cir. 1995) (reviewing case law finding obesity not covered by the ADA); *Whaley v. S.W. Student Transp., L.C.*, 2002 U.S. Dist. LEXIS 9103, 10 (D. Tex. 2002) (holding that obesity is not a disability because it is not a physical or mental impairment that substantially limits a major life activity); Marc A. Koonin, *Avoiding Claims of Discrimination Based on Personal Appearance, Grooming, and Hygiene Standards*, 15 LAB. LAW. 19, 33-34 (1999) (noting California, Pennsylvania, Missouri, North Dakota, and New York courts have ruled that obesity alone is not a disability).

71. *Petersen*, *supra* note 15, at 127 (citing *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695, 697 (N.Y. 1985)); see also *Blodgett v. Bd. of Trs., Tamalpais Union High Sch. Dist.*, 20 Cal. App. 3d 183 (1971) (finding discrimination where school board's decision not to reemploy an overweight gym teacher was based solely on her physical condition without considering that she was still able to perform the job); Koonin, *supra* note 70, at 34 (noting that a New Jersey trial court recently held "obesity is protected under the New Jersey Law Against Discrimination, which does not require an impairment to limit a major life activity in order to qualify as a handicap" (citing *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 273-78 (N.J. Super. Ct. App. Div. 1991)).

72. 10 F.3d 17 (1st Cir. 1993).

73. See *Cook*, F.3d at 23; see also *Taussig*, *supra* note 3, at 957 (noting the court based its holding on "society's stereotypical perceptions of overweight people that promote discrimination").

had the perception that obesity impaired the plaintiff's life by limiting mobility,⁷⁴ the perceived disability prong of the Rehabilitation Act was satisfied.⁷⁵

In *State Division of Human Rights v. Xerox Corp.*,⁷⁶ the New York Court of Appeals went even further, holding that obesity alone was a "physical or medical impairment" under the statute regardless of whether obesity was mutable or not.⁷⁷ Obesity can be considered a physical impairment because obesity "is a physiological condition that affects several bodily systems."⁷⁸ Also, obesity-related illnesses, such as compulsive overeating, may qualify as a mental impairment under the statutes.⁷⁹ However, despite the holding in *Xerox*, most plaintiffs who have been successful in making an obesity discrimination claim under these acts have been considered morbidly obese, suggesting that less obese persons may not fair as well.⁸⁰

II. Finding a Solution

Courts adamantly oppose sexual harassment⁸¹ and racial discrimination⁸² in schools, but, rather than taking a stand against obesity harassment, courts have written it off as "simple acts of teasing."⁸³ In *Davis v. Monroe County Board of Education*,⁸⁴ while addressing sexual harassment, the Supreme Court said that

74. *Cook*, 10 F.3d at 23.

75. *Id.*; see *supra* note 46 and accompanying text.

76. 480 N.E.2d 695 (N.Y. 1985).

77. *Id.* at 697; see also NAT'L EDUC. ASS'N, *supra* note 2 (stating that in Oregon, obesity can be considered a handicap with respect to fair employment practices if the obesity "substantially limits one or more of the person's major life activities" and that the California Supreme Court found obesity could form the basis for a violation of the fair employment law if there was a physiological basis for the condition).

78. Taussig, *supra* note 3, at 957-58.

79. See *id.* at 958.

80. See *Furst v. N.Y. Unified Court Sys.*, No. 97-CV-1502, 1999 U.S. Dist. LEXIS 22588 at 13 (E.D.N.Y. 1999); see also *Andrews v. Ohio*, 104 F.3d 803, 808-09 (6th Cir. 1997) (holding there is no remedy under the ADA for those alleging that weight is a mere physical characteristic within the "normal" range and not the result of a physiological disorder); Koonin, *supra* note 70, at 33 (noting that even morbidly obese plaintiffs are unlikely to be considered disabled without additional factors such as a physiological basis or a perception by the employer that plaintiffs should be denied an opportunity).

81. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 629 (1998).

82. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

83. *Davis*, 526 U.S. at 651-52; see also Weber, *supra* note 67, at 1092 (stating that courts frequently fail to take disability discrimination seriously and therefore fail to provide adequate legal solutions to the harassment inflicted).

84. 526 U.S. 629 (1998).

"[d]amages are not available for simple acts of teasing and name-calling among school children," specifically using the example of an overweight child who skipped physical education class to avoid teasing due to her size.⁸⁵ The Court justified this type of teasing as "understandable," saying that "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it."⁸⁶

School-yard teasing may be inevitable; however, it is critical that the motives and behaviors be analyzed in order to distinguish simple teasing from harmful harassment. The derision and disdain many overweight children face daily can have long and serious implications on their social, socioeconomic, and medical livelihood.⁸⁷ In some cases, the harassment has reached a level of severity such that it has begun to cement psychological distress in the personalities of obese children.⁸⁸ Surely those results don't follow from simple teasing. There must be a better safeguard in place to protect obese children from the life-long ramifications of educational and personal relations compromised by weight harassment.

A. How Obesity Discrimination Fits into the Current Remedy Framework

Although the current disability statutes have been used to safeguard the rights of obese persons in limited circumstances, this legislation is largely inadequate to address the problem, especially in relation to children.⁸⁹ However, despite their limitations, these statutes offer important guidance for the formation of effective obesity discrimination legislation.

1. Drawing from Title IX's Policies and Plans

The concern about obesity harassment in schools as a legal

85. *Id.* at 652.

86. *Id.* at 651.

87. See *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 28 (1st Cir. 1993) (concluding that "[i]n a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment"); see also *supra* notes 22-29 and accompanying text.

88. See Janssen et al., *supra* note 4, at 1187-88 (stating that the "prevalence of social problems among obese adolescents is quite high, and these social problems are predictive of both short-term and long-term psychological outcomes" and that "it is possible that obese youth may be the victims of bullying behaviors, whereas the same may not hold true for moderately overweight youth").

89. See Theran, *supra* note 12, at 194 (stating there are no adequate remedies for weight-based discrimination at the federal, state, or local level).

matter is relatively novel, but one can draw reasonable inferences on the effects of pervasive harassment from cases like *Davis v. Monroe County Board of Education*, where the plaintiff was repeatedly exposed to sexual harassment.⁹⁰ Many sexual harassment claims are brought under Title IX of the Education Amendments of 1972,⁹¹ which addresses sexual harassment and gender inequality in schools, but does not deal with obesity discrimination.⁹² Title IX is important to this analysis because of its structure and the remedies it provides to children victimized by sexual harassment which is detrimental to their educational opportunities.⁹³

One claim available to a plaintiff under Title IX is that he or she was subjected to "hostile environment" harassment.⁹⁴ A disparaging comment aimed at an individual based on some personal characteristic can create a hostile environment and falls in the realm of anti-discrimination laws.⁹⁵ Under the hostile environment theory, a plaintiff must establish that the circumstances can "(1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment."⁹⁶

The Supreme Court in *Davis* held that recipients of federal education funds can be held liable under Title IX if they are knowingly indifferent to student-on-student sexual harassment.⁹⁷ In order to succeed in such an action, "a plaintiff [also] must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."⁹⁸

90. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653-54 (1998).

91. 20 U.S.C. §§ 1681-1688 (2000).

92. See *id.* § 1681(a) (stating, with certain exceptions, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

93. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2001) (noting that the Supreme Court has held that "Title IX also permits a plaintiff to recover damages from a federally funded educational institution for certain cases of student-on-student sexual harassment").

94. *Davis*, 526 U.S. at 644-53.

95. See *Saxe*, 240 F.3d. at 206.

96. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

97. See *Davis*, 526 U.S. at 646-47. But see *id.* at 644 (noting that recipients of federal funding are only liable if they have the authority to take remedial action).

98. *Id.* at 651.

In *Cannon v. University of Chicago*,⁹⁹ the Court held that Title IX should be construed to authorize an implied right of action.¹⁰⁰ Furthermore, because federal courts have the power to provide "appropriate relief in a cognizable cause of action brought pursuant to a federal statute"¹⁰¹ and there is no indication that Congress intended to limit the available remedies for a Title IX violation,¹⁰² both monetary damages and equitable relief are available.¹⁰³

2. Michigan's Weight Discrimination Legislation

Michigan is the only state to have passed legislation directly addressing weight discrimination, although it does so within the context of contracts and employment.¹⁰⁴ The Elliott-Larsen Civil Rights Act¹⁰⁵ has more lenient standards than the ADA or the Rehabilitation Act in that a plaintiff does not have to prove that illegitimate criteria, such as weight or size, were the sole reasons or even the main reason for the termination.¹⁰⁶ The statute also places more responsibility on the defendant, requiring the defendant to state a non-discriminatory reason for its action once the plaintiff shows a prima facie case of size discrimination,¹⁰⁷ either by proving intentional discrimination or disparate treatment.¹⁰⁸ A plaintiff can establish a prima facie case by

99. 441 U.S. 677 (1979).

100. *Id.* at 709.

101. *Franklin v. Gwinnett County Pub. Sch.*, 505 U.S. 60, 71 (1992).

102. *Id.* at 72.

103. *Id.* at 76.

104. See *Bierman*, *supra* note 13, at 973-74 ("Michigan has led the nation in the realm of employee protection by including height and weight as prohibited forms of discrimination in its civil rights law, and the District of Columbia has added personal appearance and sexual orientation to its list of proscribed discriminatory factors.").

105. MICH. COMP. LAWS §§ 37.2101-37.2804 (1979); see also *Theran*, *supra* note 12, at 190 (noting that Art Stine, Ombudsman of the Michigan Department of Civil Rights, said that since its issuance into law, there have been only a few cases of obesity discrimination tried under the Elliott-Larsen Civil Rights Act).

106. See *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286, 291 (E.D. Mich. 1993) (citing *Dubey v. Stroh Brewery Co.*, 462 N.W.2d 758, 759 (Mich. App. 1990)); see also *Penzato v. Continental Cablevision of Mich., Inc.*, No. 175748, 1996 Mich. App. LEXIS 1067 at *5 (citing *Barnell v. Taubman Co.*, 203 512 N.W.2d 13, 19 (Mich. App. 1993)).

107. See *Byrnes*, 811 F. Supp. at 292. A plaintiff can establish that the defendant's stated reasons for its actions are pretexts: "(1) by showing the reasons had no basis in fact, (2) if they have basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were the factors, by showing that they were jointly insufficient to justify the decision" (citing *Dubey*, 462 N.W.2d at 760).

108. See *Penzato*, 1996 Mich. App. LEXIS 1067 at *4 (citing *Wolff v. Auto. Club*

showing that "(1) she is a member of a statutorily protected class; (2) that she was qualified for the job; (3) that she was discharged from the job; and (4) that she was replaced by someone outside the protected group."¹⁰⁹ This statute is important because it proves that it is possible to construct legislation aimed at protecting obese persons from systematic discrimination.

3. Leaning on the Constitution with an Equal Protection Claim

The Equal Protection Clause¹¹⁰ seems a likely place to find protection for obese children because the Court has used the Fourteenth Amendment to strike down racial¹¹¹ and gender discrimination at school.¹¹² However, the same protection is not afforded to obese persons.¹¹³ The Supreme Court refused to extend heightened scrutiny to persons with disabilities in *City of Cleburne v. Cleburne Living Center*,¹¹⁴ leaving little chance that obese persons, as an even less distinguished class, would be afforded protection. The Court noted that if protection was afforded to disabled persons, the Court would have difficulty determining which other classes should be afforded protection.¹¹⁵ The difficulty of classification in obesity claims mirrors that in the disability realm because the lines between normal weight, overweight, and

of Mich., 486 N.W.2d 75, 78 (Mich. App. 1992)).

109. *Id.* (citing *Featherly v. Teledyne Indus., Inc.*, 486 N.W.2d 361, 364 (Mich. App. 1992)).

110. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

111. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that "plaintiffs and others similarly situated for whom the actions have been brought are, by reason of [the racial] segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment").

112. See *United States v. Virginia*, 518 U.S. 515, 519 (1996) (holding that the United States violated the equal protection guarantee by precluding women from attending Virginia Military Institute).

113. See *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953-54 (7th Cir. 2002) (noting that Blacks and women are protected classes but classes such as homosexuals and the obese are not).

114. 473 U.S. 432, 442-44 (1985) (holding that legislation "singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others" rather than an attempt to treat them in a disparaging way).

115. See *id.* at 440-41 (stating "[w]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))).

obese are not always clear.¹¹⁶ Still, many people feel that exempting discrimination against obese persons from heightened scrutiny gives "antifat prejudice and discrimination free play."¹¹⁷

Other constitutional claims also may fail because the Court does not recognize a fundamental right to education.¹¹⁸ However, the Court noted the importance of education in *Brown v. Board of Education*, stating: "[E]ducation is perhaps the most important function of state and local governments . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹¹⁹ Emphasizing the importance of education, "almost every state constitution commands the state legislature to provide a free primary and secondary public education to the state's students."¹²⁰ In addition, the international community has recognized such a right as fundamental.¹²¹ This suggests that it may be fair and just for the Supreme Court to extend the protection of the Constitution to a child's right to education. As of yet, however, it has not.

B. A Consideration of Possible Solutions

Because there is no federally recognized fundamental right to an education, obese children are unlikely to receive protection against discriminatory actions that threaten their education by way of a federal constitutional claim. However, looking beyond this initial hurdle may reveal a more effective solution to this problem as "a court will not strike down school disciplinary policies unless they are 'wholly arbitrary,' 'without any reasonable justification,' or are an abuse of power which 'shocks the conscience.'"¹²² This gives state and local legislatures substantial

116. See Theran, *supra* note 12, at 136 ("Weight-based discrimination has the potential to affect every single American, fat, average-weight, or thin, because . . . there is no 'minimum weight requirement' for discrimination— 'too fat' is squarely in the eye of the beholder.").

117. Theran, *supra* note 12, at 169; see also Petersen, *supra* note 15, at 133 (noting that many argue that opening the courts to obesity discrimination claims will flood the system because of the difficulty in classification, but that the legislatures and courts could implement safeguards to ensure the dockets are not overwhelmed with these claims).

118. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973); see also McKinney, *supra* note 27, at 1328-29.

119. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

120. McKinney, *supra* note 27, at 1329.

121. See generally Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 44; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

122. McKinney, *supra* note 27, at 1329 (citing *Dunn v. Fairfield Cmty. High Sch. Dist.* No. 225, 158 F.3d 962, 965-66 (7th Cir. 1998)); see also *Fuller v. Decatur Pub.*

latitude to formulate policies that conform to the needs of their communities and the specific concerns of the schools in their districts, including protecting obese students from harassment.¹²³

1. Including Obesity as a Disability Under the IDEA

Some scholars and commentators suggest that statutes such as the ADA and the Rehabilitation Act should be extended to include obesity to make the workplace more hospitable and comfortable for overweight workers.¹²⁴ The same argument could be made with respect to the IDEA in an effort to protect a child's access to a learning environment.¹²⁵ A school environment of constant harassment may qualify as a violation of the Act, assuming the obese child is eligible for protection under the IDEA.¹²⁶

The IDEA may be a closer fit for such expansion than the ADA or the Rehabilitation Act because of its inclusion of emotional disturbance in its definition of disabilities.¹²⁷ Obese children who are harassed and bullied to the point of reduced self-esteem may show any or all of the symptoms described in the IDEA.¹²⁸ This evidence, coupled with research demonstrating the emotional consequences of obesity harassment, may enable overweight students to formulate a claim of emotional disturbance under the IDEA.¹²⁹ An obvious drawback of this solution is that it requires waiting until the child shows signs of and admits to an emotional disturbance before the statute can take effect. This may mean years of torment for the child.

Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 822 (C.D. Ill. 2000).

123. The remedies suggested here are statutory in nature. They do not touch on common law remedies such as the intentional infliction of emotional distress, which some say may be the only path to relief in some harassment situations. See Weber, *supra* note 67, at 1120.

124. See Taussig, *supra* note 3, at 956 ("The extension of the Americans with Disabilities Act to include the overweight . . . would certainly be a beginning."); see also Petersen, *supra* note 15, at 110 (stating that several scholars have said the ADA should be extended to overweight people).

125. See Weber, *supra* note 67, at 1112.

126. See *id.*

127. See *supra* notes 56-57 and accompanying text. Note that the Rehabilitation Act has been used to find alcoholism and substance abuse are disabilities. See *supra* note 49 and accompanying text.

128. See 34 C.F.R. § 300.7(c)(4)(i) (2004).

129. See also *supra* notes 22-29, 56-57 and accompanying text. See generally Strauss, *supra* note 18.

a. Asserting Obesity as a Disability Is Not a Permanent Solution

One should use care in asserting, as a permanent fix, that obesity is either a physical or mental disability. A blanket classification of obesity as a disabling factor in children may prevent children and their parents from asserting a discrimination claim, because parents of overweight children generally will not want to classify their child as physically or mentally disabled when she is an otherwise healthy person and does not require special assistance.¹³⁰

The IDEA places great emphasis on demonstrating a need for special educational services.¹³¹ Therefore, the Act does not cover claims for disabilities that do not result in a need for special services at school.¹³² This could seriously limit an overweight child's chances of filing a claim under this Act, making the IDEA "a less than ideal avenue for relief in harassment cases."¹³³ Even if such a claim would fit under the IDEA, the Act would require the school to allocate its special education funding for purposes of curbing harassment. This may be harmful not only to the overweight child, who may face isolation or special class schedules, but also to the mentally and physically disabled children who need as much attention and as many resources as possible to ensure an appropriate education.

Although the administrators in *Shore Regional High School Board of Education v. P.S. ex rel. P.S.*¹³⁴ felt an appropriate solution to the harassment P.S. faced due to his appearance was to isolate him, alter his class schedule, and keep him away from those who were destructive,¹³⁵ this is not a workable, long-term solution to prevent harassment at school. In fact, the IDEA does not suggest isolation is a proper solution, stating that children with disabilities are to be educated with non-disabled children to the "maximum extent appropriate."¹³⁶

130. See Theran, *supra* note 12, at 195 (stating "attempts to characterize varying degrees of overweight and obesity as a disability have mostly fallen flat, not only with the courts and legislatures, but with overweight individuals and the general public themselves").

131. See Weber, *supra* note 67, at 1112.

132. See *id.* at 1111-12.

133. See *id.* at 1112.

134. 381 F.3d 194 (3d Cir. 2004).

135. See *id.* at 196.

136. 20 U.S.C. § 1412(a)(5)(A) (2000). According to the statute:

To the maximum extent appropriate, children with disabilities . . . [should be] educated with children who are not disabled, and special classes,

Also, classifying all obese persons are handicapped or disabled would not prevent employment discrimination based on obesity because this would place an onerous burden of proof on the plaintiff in every case.¹³⁷ As discussed, most courts that classify obesity as a disability have done so only with respect to morbid obesity.¹³⁸ Because morbidly obese persons account for only one percent of the population as a whole,¹³⁹ and a much smaller cross section of children, very few overweight children would be protected unless courts expanded their definitions of what degree of obesity constitutes a disability. The burden on the plaintiff child to establish a physical impairment will mean convincing the courts that she should have protection,¹⁴⁰ but may not need the special curriculum or special education facilities provided by the IDEA.¹⁴¹ This is not a perfect fit under the IDEA.

b. Defining Obesity as a Disability Is a Short-term, Workable Solution

Although courts have not been willing to extend the definition of disability to include obesity, many scholars feel that a "blanket rejection of obesity as a handicap is a societal sanctioning of hatred and intolerance for an oftentimes uncontrollable condition."¹⁴² Furthermore, some believe that, cost aside, all students should have help overcoming their disabilities, whether or not are defined as "children with disabilities."¹⁴³ In order to provide educational assistance to obese children under the IDEA, the question "should not be whether a person is disabled as that term is defined under the IDEA. Instead, the issue should be whether a person is not able to receive an appropriate education because of a disability."¹⁴⁴ Under this approach, courts would need

separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id.

137. Bierman, *supra* note 13, at 971 (describing that the plaintiff would have "the burden of proving that the obesity was a hiring factor, that it impaired job performance and that the employer could have made reasonable accommodations").

138. See Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17, 23 (1st Cir. 1993) (affirming jury's determination that morbid obesity was a disability under the Rehabilitation Act); *supra* notes 68-80 and accompanying text.

139. See Taussig, *supra* note 3, at 929.

140. See Theran, *supra* note 12, at 195.

141. See *supra* notes 52-67, 99-103 and accompanying text.

142. Petersen, *supra* note 15, at 133.

143. Colker, *supra* note 29, at 58.

144. *Id.*

to reassess their analysis of a disability and look not only at a statutory definition of "disabled," but also at the effects of the asserted disability on the educational environment for the child.

Although using the IDEA to prevent discrimination and harassment may not be the best solution, it may provide a temporary remedy under the above criteria while other legislation is under consideration. In order for this to have any bearing on children, courts would need to be more willing to find overweight children disabled under the IDEA and expand the scope beyond morbid obesity¹⁴⁵ because very few children fit this category.¹⁴⁶

2. Enacting Legislation in Each School District

Some schools have taken strides independently to protect their children from bullying and harassment by adopting policies that mandate that students may not harass, intimidate, or bully students at school based on height, weight, or disability.¹⁴⁷ Policies like this are significant in two respects: they speak specifically to weight, and they differentiate between weight and disability, clearly showing the two are not the same (yet harassment based on either characteristic should be treated the same). A benefit of these policies includes a more active approach in reprimanding harassers. The courts already have found that those children "who are inconsiderate, disrespectful, mean or even vicious, to others should be 'consequenced' for what they do Students must be taught—at school if not at home—that it is reprehensible to cruelly mock and malign . . . other students—for any reason."¹⁴⁸

Although the initiative of individual school districts has provided some momentum for addressing obesity discrimination, allowing the issue to be solved at the local level presents several problems. First, many parents of children with special needs must maintain good working relationships with people in the district in order to help their children, and these policies place the two groups at odds with one another. Second, local policies prevent a

145. See Taussig, *supra* note 3, at 957 ("Future courts should endorse the First Circuit's reasoning and extend the holding in *Cook* beyond morbid obesity to the prohibition of all weight discrimination.").

146. See *supra* notes 137-140 and accompanying text.

147. See, e.g., 17 GUAM CODE ANN. § 3112.1(1)(b) (2004) (Policy Against Bullying) ("Harassment, intimidation, or bullying includes, but is not limited to, such a gesture or written, verbal, or physical act that is reasonably perceived as being motivated by a pupil's . . . disability, height, [or] weight . . ."); see also NAT'L EDUC. ASS'N, *supra* note 2.

148. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 955 (7th Cir. 2002).

uniform and consistent application of discrimination protections. Because the Elliott-Larsen Civil Rights Act offers evidence that similar policies can be successfully implemented at the state level, state legislatures should pick up where school districts have left off in adopting solutions to this issue.¹⁴⁹

3. Enacting Protective State Legislation for Obese Children

The effects of harassment are the same whatever the underlying motive.¹⁵⁰ The harassment girls face at the hands of discriminating boys and the persistent degradation black children face at the hands of white kids create the same feelings of inferiority, self-loathing, and isolation that obese children face at the hands of harassing non-obese children.¹⁵¹ However, the former types of harassment are legally prohibited whereas the latter is not. Therefore, the necessary first step is to put all types of systematic harassment on the same playing field because "obesity should be afforded the same legislative protections that accompany being a member of a protected class."¹⁵²

One of the major difficulties in creating a statute protecting obese children is the problem of classification.¹⁵³ When dealing with race or gender discrimination, a "suit can begin with the assumption that a plaintiff is a member of a particular race or gender, whereas an appearance discrimination suit cannot start with the same certainty that an individual's appearance is a handicap."¹⁵⁴

This may require defining a class of overweight people to protect—establishing a bright line separating protected obese children from others who may be overweight according to medical standards, but do not meet the established criteria for obesity.¹⁵⁵ If the statute is written broadly, it would emphasize the seriousness of the problem and the need to protect all obese

149. See *supra* notes 104-109 and accompanying text.

150. Theran, *supra* note 12, at 115 ("[M]ost types of discrimination are functionally the same, and the kinds of harms they perpetrate vary only with respect to the target population.").

151. See Bierman, *supra* note 13, at 975 ("Obesity can be closely associated with other protected classes such as race, sex, color, age or religion.").

152. *Id.*

153. See *supra* notes 115-117 and accompanying text.

154. Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2046 (1987).

155. See Bierman, *supra* note 13, at 974 (stating that "[o]ne problem that occurs in protecting obesity or weight under civil rights laws is which levels of obesity should be protected").

people, while a more narrowly written statute may limit the protection afforded to obese or morbidly obese persons.¹⁵⁶ Because some limit must be established, and mildly overweight children generally do not face as much discrimination, a threshold set at significantly obese children may be the better choice.¹⁵⁷ A problem with this approach is that unlike other protected classes that are based on immutable characteristics, obesity statutes would require the judgment of a third party to examine a child and determine whether she meets the criteria.

An effective way to address this problem may be to enact state legislation that aims to protect obese children by including physical attributes as one element in an examination of the totality of the circumstances in which the harassment and discrimination occurs, rather than focusing solely on the child's body shape and size.¹⁵⁸ It may be better to place emphasis on the totality of the circumstances, considering elements such as: the type of harassment faced, the comments made, the injuries suffered, the setting, and the number of harassers, as well as their motivation.¹⁵⁹ By including more elements, teachers, administrators, and courts may be better able to determine the motivating factors behind the harassment and make clearer assessments of the protection necessary.¹⁶⁰

A statute could be modeled on the remedy guidelines of Title IX, under which students can prove harassment by establishing, among other things, a hostile environment.¹⁶¹ Under the proposed state obesity legislation, the same criteria may be used. Students should be required to show the harassment is "so severe, pervasive, and objectively offensive, and that so undermines and

156. See *id.* at 975; see also Lynn T. Vo, *A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance-Based Anti-Discrimination Law*, 26 S. ILL. U. L.J. 339, 356-58 (2002) (calling for a narrowly-tailored statute to better protect against discrimination based on appearance).

157. See Bierman, *supra* note 13, at 974.

158. See Theran, *supra* note 12, at 115 ("[W]e should adopt a more flexible approach, which would essentially allow . . . antidiscrimination statutes to be applied to any group for which there is substantial proof of systematic discrimination."); see also Vo, *supra* note 156 (proposing that states protect individuals against discrimination based on physical appearance by implementing statutes narrowly tailored to protect against appearance-based discrimination where there are no other legal remedies).

159. See *supra* note 158 and accompanying text.

160. See *supra* note 144 and accompanying text (recognizing that the way a person's disability affects his or her education should be the determining factor rather than whether he or she fits into a specific definition of disability).

161. See *supra* notes 94-96 and accompanying text; see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2001).

detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."¹⁶² This removes the focus from the degree to which the person is overweight or disabled and places the focus instead on the effects of the harassment on the victim. As noted above, research shows that obese children are subjected continually to a hostile learning environment.¹⁶³

If the elements mentioned above are present, the proposed statute should allow a private person to bring a suit for at least injunctive relief, if not damages, against the harassers and the educational institutions that knowingly fail to protect obese children against persistent and pervasive harassment.¹⁶⁴ The IDEA requires an administrative process before a case reaches the court systems, and once the case is taken to court, if at all, the court gives great deference to the administrative body's findings.¹⁶⁵ The process of administrative proceedings can be viewed as unfair, imposing time-consuming administrative processes on families which may not be able to accommodate the schedules because of family or work obligations.¹⁶⁶ Therefore, at a minimum, such administrative procedures, if adopted in the proposed statute, would need to be streamlined and made more user-friendly to families of overweight harassment victims.

Furthermore, the punishment for knowingly allowing such harassment to continue should be directed at the administrators and teachers responsible for the children. The Supreme Court has already asserted that teachers are the authority figures at school and assume responsibility for the children under their control.¹⁶⁷

162. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

163. *See supra* notes 2-5, 21-29 and accompanying text.

164. *See* Brian A. Snow, et al., *The Problem of Determining Title IX Liability*, 154 ED. LAW REP. 1, 1-2 (2001) ("While the National Government may enforce Title IX by threatening to withdraw all federal funds, the more significant enforcement mechanism is the ability of private parties to bring suits, for both damages and injunctive relief, against educational institutions." (citations omitted)); *see also* *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 73 (1992) (holding monetary damages are available under Title IX); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979) (holding that the statute could be enforced through implied right of action); *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1018-19 (7th Cir. 1997) (holding that the school board and district could be liable under Title IX if it was shown they had actual knowledge of the discrimination and failed to take action).

165. *See supra* notes 58-64 and accompanying text.

166. *See* Colker, *supra* note 29, at 55. The process can also be unfair to poor children who have less access to legal advocacy.

167. *See* *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, 370-71 (1985); *see also* NAT'L EDUC. ASS'N, *supra* note 2 ("[Teachers] can foster a better learning and growing environment for students with unique needs due to size.").

Those teachers can be held responsible for unreasonable indifference to harassment of which they are aware.¹⁶⁸ The same standards should be applied here to ensure that students are given highest priority, that those who need discipline are accounted for, and that schools are run in a safe, efficient, and beneficial manner.¹⁶⁹

The statute should make available both equitable and monetary relief. Title IX takes a similar approach, allowing courts to provide any adequate remedy, whether it is monetary or equitable relief.¹⁷⁰ Equitable relief may be the most effective way to end the harassment, but the legislation will have to be prepared to enforce such a ruling. The schools should have a plan in place to implement the ruling and ensure there will be no fallout following the suit. If such a plan cannot be implemented or the schools or courts do not feel the plan would be effective, the school's ability to provide monetary relief may be valuable to overweight children who may choose to change schools. Monetary awards to compensate for a compromised education have been upheld by the Supreme Court awarding compensatory relief under the IDEA.¹⁷¹

Conclusion

We must do more to protect obese and overweight children from harassment and discrimination at school. Currently, some non-overweight students force overweight children to forfeit part of their educational experience with hostile words and actions. A positive first step in correcting this problem would be for states to pass legislation enforcing protection of these children in the same or similar way that Title IX protects children from sexual harassment at the federal level. The statute should create a cause of action for children harassed to the breaking point—the point where educational value is lost—against those teachers, districts, and harassers who are responsible.

168. See *Davis*, 526 U.S. at 646-47.

169. See *supra* notes 30-37 and accompanying text (noting the inadequacy of school administrations to protect the interests of obese children).

170. See *Franklin*, 503 U.S. at 76 (citing *Whitehead v. Shattuck*, 138 U.S. 146, 150 (1891)); see also *supra* notes 99-103 and accompanying text.

171. See *supra* notes 65-67 and accompanying text.